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PROPERTY LAW: 1998-1999

VOLUME TWO

J. Phillips and K. Knop  
Faculty of Law  
University of Toronto

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## CHAPTER EIGHT

## PROPERTY, POLITICS, THE CONSTITUTION AND THE STATE

A) INTRODUCTION

It is a commonplace of political philosophy that the western liberal tradition places great emphasis on the freedom of the individual. This freedom is often discussed in terms of freedom from control by others, especially the state. It is also often contended that private property serves a crucial role in protecting and enhancing such freedom. Professor Jeremy Paul, for example, states that property acts "as protector of individual rights against other citizens and as safeguard against excessive government interference": "The Hidden Structure of Takings Law", (1991) 64 Southern California Law Review 1393. The same point was made many years ago by Morris Cohen, one of the leading legal realists, who argued that private property gives those who have enforceable claims to resources power over their own lives and a measure of power over the lives of others: "Property and Sovereignty", (1927) 13 Cornell Law Quarterly 8.

The enhancement of individual liberty is therefore often cited as a justification for private property in general. More particularly, it also serves as an argument for putting into private hands as many as possible of the strands in the bundle of rights that property represents. But no society places the whole bundle in individual hands, for all recognise that to one degree or another individual property rights must give way to society's collective goals. This is most obviously achieved by taxation, but there are a host of other ways in which this is also done, some of which we have discussed above - see the debate over property and discrimination. The first substantive section of this chapter examines another area where public goals and private rights, or perhaps the private rights of the few and the private rights of the many, collide - takings.

The second section of this chapter examines a somewhat different, but related, aspect of the relationship between property and the state - the extent to which citizens should have some entitlement to a minimum level of property. This introductory note began by talking about property as providing freedom from government interference. But it has long been recognised that this negative liberty is not the only kind of liberty. There is also such a thing as positive liberty, the freedom to live a full life, which may require the state to provide the means to do so. The second substantive section examines how a political theory that stresses "freedom to" might alter current conceptions of the relation between property and the state.

## B) FREEDOM FROM: THE LINE BETWEEN REGULATION AND TAKING

### THE UNITED STATES CONSTITUTION

The first two "takings" cases are from the USA. The United States Constitution contains a specific protection for property. The fifth amendment reads in part: "...nor shall any person ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation". This originally applied only to the federal government, but it was extended to the states, in part explicitly and partly by implication, by the fourteenth amendment (1868). In short, the state may take property from the citizen provided that this is done for a public purpose, such as a highway, and provided fair compensation is paid.

We are not concerned here with the intricacies of the law relating to what a public purpose is or to how compensation is calculated. The Pennsylvania Coal and Keystone cases are about whether the government has taken property at all. If it has not, no compensation need be paid. This may sound like an easy question, but the cases show that it is not. What causes the difficulty is that almost any regulation by government of any aspect of social or economic life will affect in some way the property rights of some person or persons. Anti-pollution laws, for example, limit what uses an owner can make of land and in that sense remove a strand from the owner's bundle of rights. But this is not considered a taking - or at least not generally so, for one can find, in the US in particular, people who say that practically any regulation is a taking.

But assuming that "all regulations are takings" is too extreme a position, it is also the case that most people would agree that the converse - no regulations amount to takings - is also too extreme. This position would state that the government does not "take" from the citizen unless it acquires title to land or personal property. But this would permit the state to prohibit every use, and thereby render ownership worthless, without paying compensation.

So the question in the cases is - where between these two extremes is the line to be drawn? In reading these cases do not be confused by the term "police power". It is a term of art in US constitutional law meaning the power of the states to regulate private conduct in the interests of public health, welfare and safety.

## BRITISH AND CANADIAN CONSTITUTIONS

It is well known that neither Britain nor Canada has a constitutional entrenchment of property rights like the United States. Britain does not have a written constitution (as that term is usually understood) at all. The Canadian constitution prior to 1982 dealt with property, but only to assign jurisdiction over it. While there were many who proposed entrenching property rights in the Charter of Rights, this was not done. The Canadian Bill of Rights does contain a protection for property couched in wording very similar to that of the US fifth amendment, but that is not a constitutional document.

None of this means, of course, that private property is not highly valued in the political and constitutional culture of either Britain or Canada. While it is constitutionally possible for governments in either country to seize private property for any purpose and not pay compensation, actually doing so would very likely be deemed politically illegitimate. In fact, there has long been what might be termed a common law entrenchment of property rights, and the rules containing this are discussed in Manitoba Fisheries below. Manitoba Fisheries also examines the question of when regulation becomes a taking, as does the Tener case which follows it.

While the Canadian constitution does not contain a clause entrenching the right to property (other than those pertaining to aboriginal rights), many sections of the Charter do impinge on property law to a greater or lesser degree. The injunction against unreasonable search and seizure, for example, limits the state's ability to enter private property. More importantly for our purposes, the last decade has seen a number of cases in which section 7 has been said to incorporate "economic rights". Some of these are reviewed in Haddock, the last case in the "freedom from" section.

### MANITOBA FISHERIES LTD V. THE QUEEN IN RIGHT OF CANADA (1978), 88 D.L.R. (3d) 462 (S.C.C.)

The judgment of the Court was delivered by RITCHIE, J. This is an appeal from a judgment of the Federal Court of Appeal dismissing an appeal from a judgment rendered at trial by Collier, J., whereby he dismissed the action brought by the appellant for a declaration that it was entitled to compensation for the loss suffered by reason of the provisions of the Freshwater Fish Marketing Act, R.S.C. 1970, c. F-13 (hereinafter referred to as "the Act").

The appellant company was incorporated in 1926 and was, from its earliest days until May, 1969, engaged in the purchase of fish from fishermen in the various lakes in Manitoba and the processing and sale of these fish to customers in the United States and in other Provinces in Canada. The learned trial Judge found that this company and others like it had over the years built up individual clientele in what had become a highly competitive business. The following facts are admitted by the respondent:

1. That prior to 1969 the Plaintiff owned and operated a business in the fish exporting industry in Manitoba and that the Plaintiff's business consisted entirely of some or all of the activities described in Section 21 (1) of the ...



livelihood, their occupation, and their savings. It is not alleged that the legislation has destroyed their right to work altogether. In my view, the jurisprudence that has developed under the Charter has made clear that economic rights as generally encompassed by the term "property" and the economic right to carry on a business, to earn a particular livelihood, or to engage in a particular professional activity all fall outside the s. 7 guarantee: see, for example, Irwin Troy Ltd. v. Quebec (Attorney General) .... Hence, I would conclude that it is plain and obvious that the s. 7 claim discloses no reasonable cause of action. Like the s. 15 claim, it must therefore be struck.

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## NOTES

1) In Home Orderly Services Ltd v. Government of Manitoba (1987), 49 Man. R. 246 (C.A.) the plaintiff was in the business of providing services to the partially disabled. Many of the recipients of those services had the fees paid by the government. In 1984 the government decided to provide the services itself for free, thereby effectively destroying Home Orderly's business. The company sued for compensation, citing Manitoba Fisheries. The trial court struck out the Statement of Claim as disclosing no cause of action. It stated that the Government was merely providing a competing service, which happened in this case to render the private service completely unprofitable, but it had not prevented Home Orderly from operating. The Court of Appeal upheld this decision, but principally on the ground that Home Orderly had always been substantially dependent on the state for its survival. The Court of Appeal stated that ordinarily the government must compensate for a takeover or the destruction of a private commercial venture.

Are both judgments consistent with Manitoba Fisheries and Tener? Are they in line with the views of the Ontario Court of Appeal in A & L Investments?

2) In Keystone Bingo Centre Inc. v. Manitoba Lotteries Foundation et al (1989), 48 M.P.L.R. 41 (Man. Q.B.) the plaintiff operated a commercial bingo hall until regulations made by a licensing commission effectively put it out of business. Compensation for redundant physical assets was paid, but the court rejected a claim for loss of business. Following Home Orderly, above, the court stated that while compensation would be ordered when government destroyed or damaged private enterprise, this was a case where the enterprise only operated at the sufferance of the government which had the right to set licensing terms.

3) In 1980 The City of Winnipeg designated the Fort Garry Hotel as an historic building. In 1983 the city refused a request from the hotel's owner for it to be delisted. Listing, among other things, prevented demolition of the building and limited the alterations that could be made to it. After years of losses, the owners sued for compensation for loss of value of land and losses incurred in the running of the hotel. The court, in Harvard Investments Ltd. v. City of Winnipeg (1994), 54 L.C.R. 163 (Man. Q.B.), summarised one of the owner's arguments thus: "The listing, Harvard argued, was tantamount to an expropriation in that it deprived Harvard of certain of its rights of property and ownership to the hotel by converting such rights and ownership to the City. An example of such deprivation ... was the right to demolish the hotel". The trial court's response to this argument was as follows:

"The listing ... was not a statutory or regulatory taking as such. It did not deprive the owner ... of its title to and possession of the land. It did, however, prevent the owner ... from doing with the hotel building as it saw fit.... While this may be, as Harvard argued, an effective deprivation comparable to a taking of the owner's equity in the land, it is not, in my opinion, compensable.... I am in agreement with the City's position that the listing and designation of the hotel was merely an exercise of a regulatory power similar to the regulation of the use of lands through a zoning by-law. While it may have the effect of limiting and curtailing the use of the lands, it does not amount to a taking nor does it vest any rights to the property in the City".

Harvard appealed. Two judgments were written in the Court of Appeal. Philp JA, for himself and Kroft JA, stated that: "There was a 'taking away' when the hotel was listed ..., in that the effect of the listing was to preserve in perpetuity the exterior of the hotel and certain described interior elements. But there was evidence that the listing, and the hotel's historic elegance which the listing preserved, were a marketing tool of some significance to the hotel's operation. And ... the City acquired nothing; nothing was added to the value of public property". As a result, listing was "akin to the limitations that zoning and planning regulations may impose upon a property." Philp JA cited Tener for the proposition that to constitute a taking action short of expropriation of title must add value to public property.

Having rejected Harvard's claim, Philp JA nonetheless went on to make some general comments. He stated that he was not holding that an historic listing "will never give rise to a claim for damages". That is, if a listed building "becomes commercially impracticable" either because of the listing, or as a result of a combination of that listing and other factors, such facts "may amount to a taking and entitle an owner to compensation".

Twaddle JA delivered a separate concurring opinion. He began by noting that in both Manitoba Fisheries and Tener the Supreme Court had approved the De Keyser's rule, and had also "offered guidance as to what constitutes a taking". He thought this guidance was that there were "two elements to a taking". First, "the acquisition of an asset by the authority involved", and, second, "the complete extinguishment of an asset's value to the owner". Neither of these elements was present in the case before him. First, the hotel was put out of business more by mismanagement than by the historic designation, and the city had not

acquired the hotel. Twaddle JA then went on to say that "if an owner is deprived of the right to demolish a building by reason its historical designation, the owner may well have a claim for compensation. It would, however, be necessary for the owner to establish the building to be virtually useless ... and its value thus completely extinguished". In these circumstances the first of his two elements would also be met: "if such circumstances had been proved to exist, my own view is that a notional taking could be deemed to exist as the city would have preserved a monument for the benefit of its citizens at the cost of a private owner. That would be particularly so where, as in this case, the city subsequently acquired the property on a tax sale. It could then be said that the tax sale, and the city's acquisition of the property, flowed from the historical designation which reduced the value of the property to nil and made the payment of real property taxes pointless. Conceptually, then, I see the historical designation of a building as having the potential of being an expropriation, but only in the most limited of circumstances".

4) Review the problem on page 18 of chapter 1. Add these facts:

These incidents increased public awareness of the problem of homelessness in Toronto and led the government to strike a task force on the problem. Composed of a broad cross-section of social groups, the task force issued a final report with a number of quite radical recommendations. Among the report's recommendations was that until the government could provide sufficient publicly run shelters, it should have the power to require private owners of certain types of commercial premises to allow their premises to be used as temporary shelters for homeless people during non-business hours in the winter months. Although persuaded that this recommendation would never become law, Aalto and other downtown property owners have hired a consultant to lobby against the task force report.

What legal arguments could Aalto and the other property owners make against the implementation of the task force recommendation?

5) Remember that in chapter two we looked at arguments that the courts should find that there were property rights in certain intangibles not previously recognised as conferring such rights: see Caratun et al. The following article from the Globe and Mail, 24 March 1998, by Terence Corcoran (obviously) deals with the relationship between the creation of new property rights and possible claims for compensation for expropriation:

At the Great Canadian Superstore in Langley, B.C., the recent price of four litres of 2% milk was \$3.69. Across the U.S. border in Blaine, Wash., the Canadian dollar equivalent price was \$2.60. The milk price gap, a 40% premium paid by Canadians, is the final insult of the great consumer ripoff known as the national supply management system, an elaborate structure of controls, regulations, quotas, and back-room deal making that Ottawa maintains to limit the supply of agricultural output and keep prices high. Under supply management, protected by import restrictions and high tariffs, Canadians pay billions of dollars more each year for scores of products, from cheese to chickens and eggs, with the money flowing mostly from consumers to farmers. Now, behind the scenes, an even more twisted distortion is developing, one that could cost consumers and taxpayers billions.

As the prospect of ending supply management grows under pressures created by international trade agreements, farmers are likely to begin claiming compensation for their losses. "The effect of supply management has been to create a set of property rights related to the ownership of quota", University of British Columbia professor William Stanbury said in a paper on a looming property rights debacle in the supply management sectors. Quota is the right to sell a farm product such as milk through a supply management board. In milk alone, Prof. Stanbury calculates that at current prices for quota - the amount of money a farmer must pay to purchase the right to produce a quantity of milk - the potential total value of "property rights" claims by farmers could exceed \$11 billion. The Stanbury paper was one of more than a dozen delivered over the past weekend at a conference put on by the Canadian Property Rights Research Institute, a Calgary organization dedicated to championing property rights across Canada. For the most part, property rights activists focus on how governments take away property rights. Other papers examined how rights have been systematically diminished, with case studies on Ontario's rent control regime, the Canadian Wheat Board, the environment, intellectual property, and gun control.

Prof. Stanbury's paper tackled the opposite, but no less alarming problem of how governments create artificial property rights by regulation, and then how the owners of those rights are likely to claim compensation if the rights are removed. In farm product supply management, the value of these rights - essentially the right to gouge consumers - has skyrocketed. The milk quota is the right to produce one kilogram of butter fat daily. The latest March price for quota traded on the Dairy Farmers of Ontario quota exchange was \$16,501. Lower prices exist in Manitoba and the western provinces.... Using national averages, Prof. Stanbury calculates that ... the total value of the milk quotas is \$11.8 billion. The numbers are staggering. On a per cow basis (there are about 1.1 million in the country), the value of quota is \$10,161. This compares with the value of cows, about \$1,000 each.

On a per farm basis (average 49 cows for each farm), the value of quota is about \$497,000. At that price, the value of quota is about equal to the average cost of the land, buildings, equipment and cows for an average 49 cow operation. The value of quota has fluctuated widely over the past two decades, but a recent analysis of price performance shows that milk quotas have outperformed the Toronto Stock Exchange composite index.... The quota values have real consequences. Banks grant farmers loans secured by quota. Farmers and investors have real money at stake. The result is the creation of what Prof. Stanbury describes as a "form of property rights" that now has large economic value, and an army of "owners" with a strong interest in lobbying government to maintain and protect those rights. "If supply management were abolished and all tariffs and quotas were removed, the investment in quota would disappear." The question posed by Prof. Stanbury is whether these rights should be protected: "What is an ethical approach to the economic value of property rights or quotas created by government at the behest of a narrow interest group, and which are owned by the members of the group?" He doesn't provide an answer. It shouldn't be too difficult, however, to see that there are no true property rights to protect here. Ethically, as well as economically, supply management is a cartel put in place by government to restrict supply and rob consumers to pay the farmers. Removing the system would restore the market rights of consumers, which have been appropriated by the cartel for the past 25 years.

## CHAPTER NINE

## ABORIGINAL RIGHTS

A) INTRODUCTION

This chapter provides a necessarily brief introduction to the subject of aboriginal rights in land. The issue of aboriginal rights has in the last two decades become an increasingly important legal and political one in Canada; it has also received much attention in recent years in the courts and legislatures of Australia and New Zealand and, to a lesser extent, in the USA.

The chapter begins with a review of the leading aboriginal rights cases from the 1970s and 1980s, which are about the common law of aboriginal title. The next section looks at aboriginal rights, including aboriginal rights to the use of land, in the context of the entrenchment of aboriginal rights in section 35 of the Constitution. Since that entrenchment the topic of aboriginal rights has become a constitutional issue as well as a matter of "property" law, and therefore it is discussed in both the constitutional and property courses. Section (d) of the chapter brings together the issues of aboriginal title and s. 35 (1) of the Constitution through a detailed examination of the Delgamuukw case. We conclude with looking at the intersection of aboriginal rights in land with other common law property regimes.

Before reading the cases, three general points should be borne in mind.

First, the nature and extent of aboriginal rights described here are the rights recognized by the Canadian legal system. This is not necessarily the set of rights to which the indigenous peoples themselves claim to be entitled.

Second, aboriginal rights are legally enforceable in the same sense as any other legally recognised right is enforceable, against both the State, and other residents within the State. They are rights which the indigenous peoples possess which are not possessed, and cannot be possessed, by non-native persons within the State.

Third, in this chapter the term aboriginal rights does not refer to treaty rights. The rights discussed here arise independent of any treaty.

## B) ABORIGINAL TITLE AND ABORIGINAL RIGHTS AT COMMON LAW: THE PRE-SECTION 35 CASES

A short description of aboriginal title would go as follows:

i) The absolute, or "radical", title to all land within the state, including land over which any aboriginal title or right may exist, belongs to the Crown. This "radical" title is the ultimate Crown title out of which the estates which we have studied are carved.

ii) Aboriginal title is a burden on this radical or absolute title, giving aboriginal peoples rights in the land.

iii) Having stated proposition (ii), it is difficult to say precisely what aboriginal title is. It is not an estate held in tenure from the Crown. It is not a purely personal "usufruct" interest (a right of use) held by individual aboriginal people. To this point the most detailed assessment of what aboriginal title is comes in the Delgamuukw case, reproduced below. The early cases discussed in this section give you very little sense of the content of aboriginal title.

iv) Whatever it is, aboriginal title is one form of aboriginal right. It represents "the way in which the common law recognizes aboriginal land rights". That is, "aboriginal rights and aboriginal title are related concepts; aboriginal title is a sub-category of aboriginal rights which deals solely with claims of rights to land": R. v. Van der Peet, reproduced below. In this definition, therefore, "aboriginal rights" is a general term, and "aboriginal title" is a specific instance of an aboriginal right. We will see a little later that "aboriginal rights" is, confusingly, also a term that refers to specific rights, less than "title" - for example, a right to hunt or to fish.

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### CALDER ET AL v. ATTORNEY-GENERAL OF BRITISH COLUMBIA (1973), 34 D.L.R. (3d) 145 (S.C.C.)

Calder is the first modern case in which the Supreme Court of Canada recognised the existence of aboriginal rights in land arising at common law: that is, independently of any treaty or legislative enactment. In Calder the issue was whether the Nishga people of British Columbia possessed aboriginal rights to their traditional lands in the Naas River Valley. It is, of course, the same Nishga people whose treaty with the crown is the subject of so much current debate in British Columbia.

The action was dismissed at trial, and the Court of Appeal rejected the appeal. The Supreme Court of Canada split three-three, with the seventh member of the Court, Pigeon J., expressing no opinion on the substantive issues and holding against the Nishgas on a procedural ground. Judson J., Martland and Ritchie JJ concurring, first noted that there were two "sources" for aboriginal title cited by the Nishga. One was the Royal Proclamation of 1763, which is discussed

in detail in the Constitutional Law casebook, volume 2, pp. 9-11. The relevant part of the Royal Proclamation states:

"And We do ... declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid."

In R. v. St Catharine's Milling and Lumber Co. (1888), 14 App. Cas. 46 (P.C.), an Ontario case, the Privy Council had held that the source of any aboriginal title in that instance was the Proclamation. In Calder Judson J held that the Proclamation did not apply to the area of British Columbia claimed by the Nishga. But he also stated that "I do not take these reasons [those of the Privy Council] to mean that the Proclamation was the exclusive source of Indian title. The territory under consideration in the St. Catharine's appeal was clearly within the geographical limits set out in the Proclamation. It is part of the appellants' case that the Proclamation does apply to the Nishga territory and that they are entitled to its protection. They also say that if it does not apply to the Nishga territory, their Indian title is still entitled to recognition by the Courts. These are two distinct questions."

Judson J. had little to say on the second question, that of whether the Nishga had aboriginal title apart from the Royal Proclamation. However, he did appear to find that some rights survived the assertion of British sovereignty over the area. He stated (at p. 156): "Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their fore-fathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a 'personal or usufructuary right'. What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. There can be no question that this right was 'dependent on the goodwill of the Sovereign'".

Judson J. said no more than this, because he concluded that whatever rights the Nishga may have had, they had been extinguished prior to Confederation by a series of Acts of the government of the colony of British Columbia. The effect of these Acts, which "opened up ... lands for settlement" was that "the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga Tribe might have had". Thus any aboriginal title was extinguished.

Hall J. dissented, Laskin and Spence JJ concurring. The salient part of his judgment follows:

This appeal raises issues of vital importance to the Indians of northern British Columbia and, in particular, to those of the Nishga tribe. The Nishga tribe has persevered for almost a century in asserting an interest in the lands which their ancestors occupied since time immemorial. The Nishgas were never conquered nor did they at any time enter into a treaty or deed of surrender as many other Indian tribes did throughout Canada and in southern British



## ABORIGINAL TITLE AFTER CALDER

Calder is now seen as the first modern case establishing the existence of an aboriginal title, even though at the time only a minority of the judges clearly accepted this notion. As Calder demonstrates, the question of the existence of an aboriginal title and/or aboriginal rights is adjudicated on the basis of occupation and use at the time of the assertion of sovereignty. The aboriginal right attaches to land occupied and used by aboriginal peoples as their traditional home prior to the assertion of sovereignty. Thus the content of aboriginal rights may vary from case to case; aboriginal rights are fact and site specific. The nature and content of the right, and the area within which the right was exercised, are questions of fact. Two cases litigated between Calder (1973) and Sparrow (1991, reproduced below) have proved important in the development of the law.

First, in Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development (1979), 107 D.L.R.(3d) 513 (F.C.T.D), Mahoney J. considered a claim by the Inuit inhabitants of the eastern Arctic that their lands in the Baker Lake area were subject to their rights to hunt and fish. They also asked for an order restraining the government from issuing land use permits, prospecting permits, and mining leases, and from recording mining claims which would allow mining activities in the area, and an order stopping the mining companies' operations. The court heard the testimony of two leading archaeologists who had worked in the area. They gave evidence of occupation and activity in the area during the "pre-historic" period (starting 45,000 years ago) and the historic period (from 1610), including carbon dating of artifacts discovered. They also gave evidence that Chipewayn Indians moved north at some point and hunted on the more southerly lands of the area claimed. The court also reviewed documentary evidence about European penetration, including the timing of settlement. There was also testimony from Inuit witnesses regarding their personal recollection of the Inuit way of life before and after settlement in the town of Baker Lake itself. This was supplemented by evidence produced through an extensive series of interviews with the resident Inuit regarding the contemporary Baker Lake Inuit community; attention was paid to the importance of hunting caribou and fishing to the community's survival.

Mahoney J. held that Calder provided "solid authority for the general proposition that the law of Canada recognises the existence of an aboriginal title independent of the Royal Proclamation or any other prerogative act or legislation. It arises at common law". He also stated that aboriginal title arose from the fact that when the settlers came, "the aboriginal people were already there, organized in societies and occupying the land as their forefathers had done for centuries." These facts are used as the basis for aboriginal rights and title. Mahoney J. then turned to how one determines whether there is aboriginal title in a particular case. He laid down four requirements to be met:

1. That the plaintiffs and their ancestors were members of an organized society;
2. That the organized society occupied the specific territory over which the Aboriginal title is asserted;

3. That the occupation was to the exclusion of other organized societies;
4. That the occupation was an established fact at the time sovereignty was asserted by England.

All of these requirements were met in the Baker Lake case. The court held that the first did not require "proof of the existence of a society more elaborately structured than is necessary to demonstrate that there existed among the aborigines a recognition of the claimed rights, sufficiently defined to permit their recognition by the common law upon its advent to the territory". The Inuit did have an organized society, organized to exploit the resources available and essential to human life; it was not an "elaborate" society, for all they could do was hunt and fish and survive, and therefore their aboriginal title "encompasses only the right to hunt and fish as their ancestors did." The second requirement, that of occupation, was also met. Mahoney J. stated that the nature, extent or degree of physical presence on the land required is to be determined in each case by a subjective test. The Inuit would have occupied the lands in ways different from Indian societies to the south, particularly as there was for the most part no pressure or competition from other groups. Moreover, "the exigencies of survival dictated the sparse, but wide-ranging, nature of their occupation". That is, "To the extent that human beings were capable of surviving on barren lands, the Inuit were there: to the extent that the barrens lent themselves to human occupation, the Inuit occupied them." The third requirement, exclusivity, led to a mixed result. On the basis of archaeological and historical evidence the court found that the boundary between the Inuit and the Indian land to the south was inside the Baker Lake area claimed by the Inuit. The result was that Mahoney J. excluded some southerly portions of the land claimed because the Chipewayn Indians had used the land as well as the Inuit. On the fourth requirement, Mahoney J. found that "at the time of England asserted sovereignty over the barren lands west of Hudson Bay the Inuit were the exclusive occupants" of a particular portion of the territory.

Thus "an aboriginal title to that territory, carrying with it the right freely to move about and hunt and fish over it, vested at common law in the Inuit" as of the time of the assertion of sovereignty.

The Baker Lake test has been cited often, but is now subject to at least two qualifications. First, doubt has been cast on the third requirement - that of exclusivity - in a claim for aboriginal title. In any event, there is likely no need for exclusivity if the claim is for some particular right - such as a right to hunt - rather than for aboriginal title. Second, as the Sparrow, Van der Peet and Gladstone cases discussed below demonstrate, the Supreme Court has also added the requirement that to be an aboriginal right an historical practice must be "an integral part" of the "distinctive culture" of the people in question.

Baker Lake also discussed the nature of an "aboriginal title". Here Mahoney J. noted that "Canadian courts have ... successfully avoided the necessity of defining just what an aboriginal title is". One thing that was clear, however, is that it "was not a proprietary right".

